

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-6049

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

SECRETARY OF THE INTERIOR, et al.,

Defendants-Appellants,

v.

COUNTY OF SUFFOLK, et al.,

Plaintiffs-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

**BRIEF OF PLAINTIFF-APPELLEE CONCERNED
CITIZENS OF MONTAUK, INC.**

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April 8, 1977

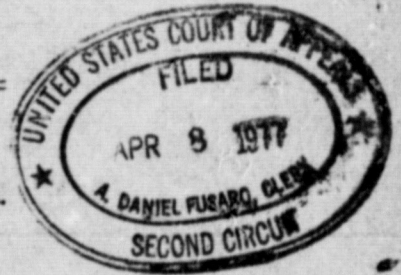




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BRIEF OF PLAINTIFF-APPELLEE
CONCERNED CITIZENS OF MONTAUK, INC.

Counter-Statement of the Issues
Presented for Review

Appellants' Statement of Issues would disregard the District Court's primary fact-finding function. Instead Appellants would thrust on this Court the burden of sifting through 4,043 pages of testimony, 32 witnesses (most of whom were experts testifying in highly technical areas, and 273 documents (many of which are several volumes thick). This misconstrues the review function of this Court under the Federal Rules.

Appellee respectfully submits that the real issues here presented for review are:

- 1) Whether the District Court's findings of facts were "clearly erroneous" to the effect that the Secretary of Interior had:
 - a) ignored the practical effects of local governmental licensing, permitting and review power, in the NEPA documents;
 - b) failed to consider the environmental impact of specific probable pipeline routes from the outer continental shelf, in spite of the fact that projection of such routes is routinely made by industry and could have been made by the Secretary or his agents;

- c) greatly overstated peak oil and gas production for Sale 40 and significantly understated the cost of such production, including pipeline construction; this resulted in a serious lack of consideration of the likelihood and attendant dangers of increased tanker traffic and an overestimate of the net value of the entire project;
- d) failed to consider the possible impact of particular tract-selection choices on the feasibility and sites of pipelines; there was no consideration of the alternatives of either excluding industry-preferred tracts, or including less highly desired tracts in the final sale offer because of related onshore impacts and developments; and
- e) failed to consider the alternative of separating exploration from production leasing.

2) Whether in view of the above findings the District Court improperly applied the "rule of reason" to conclude that the Secretary had violated NEPA.

Statement of the Case

Appellee Concerned Citizens agrees with the Statement presented in the Federal Appellants' Brief to the extent that it describes the background of the case, the course or proceedings and its disposition in the Court below (Fed. App't. Brf., pp.3-6).

We would, however, note the omission from Federal Appellants' Brief (pp.8-13) in its discussion of "Interior's

NEPA Activity for OCS*Leasing and Lease Sale 40" of any reference to the following chronological summary of Interior Activities found by the District Court (Decision, pp.75-78)

- 1965 Interior advised the oil companies that a lease sale in the Atlantic was planned.
- April 18, 1973 President announced decision to accelerate OCS leasing and sales. (This was six months before the Arab oil embargo.)
- Sept. 12, 1973 Interior announced accelerated OCS program.
- Jan. 23, 1974 President directed Interior to increase OCS lease acreage to 10 million acres beginning in 1975.

All of this occurred before the date set (May, 1974) in Federal Appellants' Brief, p. 9, as the first INTERIOR involvement in the environmental evaluation of OCS Sale 40.

We would further note that the Federal Appellants' Brief (pp. 13-17) discussion of Interior's Post-Sale Environmental Activity is irrelevant to the issues. The Final Environmental Impact Statement on Sale 40 had issued on May 25, 1976. The Secretary announced his decision to sell on June 30, 1976, and the sale was held on August 17, 1976. Post-sale activity has no bearing whatsoever on the propriety of that sale under NEPA.

Federal Appellants' discussion in their Statement at pp. 17-21 on "The 40 EIS Analysis of State-Local Land Use

* Outer Continental Shelf

Control and Onshore OCS Development" would appear to be more argument than statement and is responded to below in the argument.

ARGUMENT

I. THE DISTRICT COURT'S FINDINGS ARE NOT
"CLEARLY ERRONEOUS" AND THEREFORE SHOULD
NOT BE SET ASIDE.

The ultimate understatement would be that this is a complex case. The trial and appeal records are too large and detailed to permit other than a brief summary of the proceedings and decision below. In a case such as this, it is essential that this Court apply the "clearly erroneous" review scope of Rule 52(a), F.R. Civ.P.

As Judge Learned Hand held in U.S. v. Aluminum Co. of America, 148 F2d 416, 433 (2nd Cir. 1945):

"(The District Court's) duty is to sift the evidence, to put it into logical sequence and to make the proper inferences from it; and in the case of a record of over 40,000 pages like that before us, it is physically impossible for an appellate court to function at all without ascribing some prima facie validity to his conclusions. Consumers Import Co. v. Kawasaki, 2 Cir., 133 F. 781,787. What the plaintiff is really asking is that we shall in effect reconsider the whole evidence de novo, as though it had come before us in the first instance. The impossibility of that at once appears, if we consider what it would have involved, had the appeal taken its usual course and been heard by the nine justices of the Supreme Court. However, whatever may be said in favor of reversing a trial judge's findings when he has not seen the witnesses, when he has, in so far as his findings

depend upon whether they spoke the truth, the accepted rule is that they 'must be treated as unassailable.'"

And as held by Judge Lumbard in Susser v. Carvel Corporation, 332 F2d 505, 510 (2d Cir 1964):

"It is not the duty of this court to consider de novo the conflicting evidence and resolve this factual issue; rather, we must review the determination of the district court to determine whether or not it is clearly erroneous."

This is particularly true in this case insofar as much of the testimony and the documents are highly technical. As Mr. Justice Jackson held in Graver Tank Co. v. Linde Air Prod. Co., 339 U.S. 605, 609-610 (1949):

"Like any other issue of fact, final determination requires a balancing of credibility, persuasiveness and weight of evidence. It is to be decided by the trial court and that court's decision, under general principles of appellate review, should not be disturbed unless clearly erroneous. Particularly is this so in a field where so much depends upon familiarity with specific scientific problems and principles not usually contained in the general storehouse of knowledge and experience."

Accordingly, the District Court's findings can be set aside only if they are clearly erroneous. As will now be shown, they are not clearly erroneous. Therefore they should be affirmed.

A. The Secretary Ignored the Practical Effects of Local Governmental Controls

After identifying the various state, county, and local governmental units susceptible to environmental impacts, noting

that their "power to affect the (OCS) operation multiplies into the hundreds" and that these powers "were virtually ignored in the relevant NEPA statements," (Decision, pp. 9-11) the District Court found:

"Evidence, which could have been brought to the Secretary's attention by the NEPA documents, demonstrates that these local governmental powers can and will be utilized to prevent landing of outer continental shelf oil over wide portions of the coast line, whether that landing is by tanker or pipeline. Failure to include an evaluation of such local opposition to pipelines or tanker-related onshore facilities necessarily resulted in a failure to gain a full and meaningful perspective on the intrinsic environmental problems related to offshore oil and gas exploration." (Decision, pp. 14-15)

With regard to the crucial question of how and when the oil, once found on the OCS, is to be brought ashore, the NEPA documents do not give the answer.* The question is crucial since the social, environmental and economic impacts will to a large extent depend on how and where the oil is landed. These impacts will vary widely, dependent on whether the oil is tankered or piped ashore, and on the location or locations where the oil is to be piped or tankered ashore.

The District Court then went on to find that the NEPA documents need not, and indeed should not, have been silent on these basic questions. Quoting in extenso from the oil company expert Franklin Brunjes, the District Court found that

* As the District Court found, despite the "enormous volume of discussion," the NEPA documents "in their critical transportation aspects are highly abstract." (Decision, p. 15)

the oil companies had already set about in providing the answer, and that the Secretary could and should have done likewise (Decision, pp. 27-36). The Court found:

"The evidence clearly established that the Secretary did not engage in inquiries to inform federal, state and local decisionmakers and the public of the alternative modes and routes of transport of Sale 40 oil and gas, and to enable government decisionmakers to understand and plan to cope with the impacts of reasonably defined tanker-pipeline options in their zoning, land use and coastal zone management planning processes." (Decision, p. 36)

And likewise with respect to the economic aspects of state and local control over the OCS operation, the NEPA documents are silent. In contrast, oil company expert Brunjes showed how the economics of pipeline vs. tanker and Landfall "A" vs. Landfall "B" could be "costed out" (Decision, pp. 37-42). The District Court found:

"This evidence establishes that it was quite possible for the Secretary to engage in an economic assessment of the effects of local opposition to pipelines. It was also reasonably necessary in order for the Secretary to know the realistic costs of the proposed action as compared to the benefits, and in order to assess fairly the economic feasibility of pipelines as against tankers. Without this information the Secretary could not make a reasoned decision as to the potential costs to be incurred by the proposed program." (Decision, pp. 42-43)

The District Court then summarized its findings on this point as follows:

"Where, as here, information was available to the government and meaningful analysis was reasonably possible on issues of such environmental significance, the Interior Department was under a NEPA-imposed

obligation to disclose the information and undertake the analysis. The conclusion is inescapable that if, in their own economic interest oil companies can project, examine and analyze fairly detailed pipeline corridors, the Secretary of the Interior, in the critical public interest of environmental protection, must do so as well." (Decision, p. 43)

Federal Appellants in their Brief at p. 26 argue that the District Court found a NEPA violation,

"not because the 40 EIS failed to discuss state and local authority but because he (J. Weinstein) was not satisfied with the quantum of the discussion." (original emphasis)

This just simply is not the case, as is clear from the above analysis of the District Court decision. If anything, the Court faulted the EIS for too much "quantum" on the wrong points.*

Federal Appellants then go on to cite the various scattered references to the state control (Appellants' Brief, p. 26). The District Court had thoroughly considered these same references (Decision, pp. 15-18) and found:

"But passing references to, and abstract listings of, state and local authority is only the beginning and not the end of the NEPA required inquiry. The next, and by far more crucial step is a projection of the site-specific, pragmatic, empirical effects of the likely exercise of such power. It is the impact of local authority, not its mere existence, that must be studied and evaluated. (Decision, p.19, original emphasis)

* The Court referred to the "enormous volume ... like a theoretical college thesis, written without the hard empirical data needed by any practical person making a decision." Decision, p.19)

Federal Appellants also look to the Coastal Zone Management Act (CZMA) for "planning and coordinating mechanisms ... to coordinate and accommodate state and local controls" (Fed. App't. Brf., p. 36). The District Court found this argument "unpersuasive" for three reasons as follows:

- 1) NEPA requires "independent assessment" of environmental damage and this responsibility "cannot be fobbed off" to the states under a different program.
- 2) CZMA operations will not be completed until 1978.
- 3) CZMA provisions were adopted after the EIS was approved and thus could not have been entered upon the Secretary's deliberations.

Furthermore, it would subvert the intent of the CZMA to lay the OCS program as a fait accompli before the States for them to try to remedy wrongs over which they had no control. The policy of NEPA is to prevent such wrongs. CZMA should not be argued as an evasion of this policy.

B. The Secretary Greatly Overstated the
Benefits and Understated the Costs of
Sale 40

The District Court found that the NEPA documents greatly overstated the projected benefits and understated the costs of OCS Sale 40 production. This involves estimated quantities of oil and gas reserves, expected peak production levels, and costs of pipeline constructions.

The District Court found that the last cost item, pipeline construction,

"has exceptional significance, in light of the Secretary's firm assumption that pipelines, rather than tankers would be the actual mode of transportation." (Decision pp. 43-44)

The Court then carefully reviewed the evidence and expert testimony of George L. Donkin on finding costs (Decision, pp.44-48), pipeline construction costs (pp.48-49), and total investment required (pp. 50-52). The Court found that the costs ranged from 75% to 109% higher than those used by the Secretary, resulting in an investment requirement of from 70% to 131.9% higher than those of the Secretary.

On the benefit side the District Court decision again reviewed the evidence and testimony of Expert Donkin. The Court found that the peak oil and gas production figure should realistically have been set at 50 to 75% of the Secretary's figure (Decision, pp. 52-56).

And from this the Court found:

"The Secretary's cost-benefit analysis is vitally linked to critical NEPA issues. ... If the Secretary has grossly understated the investment costs and overstated the daily production rates and reserves, then the timing, locations, size and number of pipelines, drilling wells and duration of construction may differ from the Secretary's projections, with resultant environmental and socio-economic impacts (off-shore and onshore) qualitatively and quantitatively different from those estimated in the NEPA documents.

The Secretary's duty under NEPA to compare Sale 40 to its alternatives, and to weigh the latter and

their environmental effects depends upon an accurate cost-benefit analysis of the Sale 40 project, without which the Secretary and other decision makers cannot adequately determine priorities and the course of action tending most strongly to further the public interest." (Decision, p. 57)

The Federal Appellants do not fault these findings but attempt to evade the issue by arguing that,

"NEPA does not contemplate the rigorous cost-benefit analyses Judge Weinstein envisions." (Fed. App't. Brf., p. 43)

But the Act itself requires a,

"systematic, interdisciplinary approach . . . to insure that presently unquantified environmental amenities and value may be given appropriate consideration in decision-making along with economic and technical considerations." [NEPA, 42 USC §4332(A)(B)]

Federal Appellants argue that the District Court's discussion of the cost-benefit analysis was aimed purely at economic considerations and that it,

"concluded that the economic costs and benefits were inaccurate so that there could be no adequate balancing of economic benefits against environmental costs." (Fed. App't. Brf., p. 44)

Accepting this arguendo, it is certainly no ground for reversal. Rather it is in accord with NEPA (42 USC §4332 B) as quoted above.

C. The Secretary Failed to Consider Separating
Exploration from Production and/or Alternative
Tracts

The District Court found that the Secretary failed to consider two potential alternatives, i.e., separation of

production rights from the exploration rights and selection of alternative tracts.

With regard to separate exploration/production rights, the District Court relied on the testimony of Government Witness Judith Gresham who,

"flatly stated that no alternative had ever been considered by the N.Y.C. office of the Bureau of Land Management in preparing for Sale No. 40." (Decision, pp. 58-59)

As the Court noted, this occurred in the face of no less than thirteen public comments, including those of the States of New York, New Jersey, Delaware, and Maryland, urging such separation. (Decision, pp. 59-60)

With regard to alternative tracts, the District Court found that Interior,

"neglected to examine the potential environmental effect of offering, and accepting bids on, tracts other than those actually proposed and leased." (Decision, p. 71)

All of the tracts selected by Interior for study were ultimately put up for sale. Interior did not consider the different impacts onshore that would have resulted from alternative tracts. The only geographically relative impacts considered were those on the commercial fishing ground.

As held by the District Court:

"No NEPA requirement has ever received greater judicial emphasis than that which prescribes 'a detailed statement' and adequate discussion and consideration of reasonable 'alternatives to the proposed action.' 42 USC §4332. The significance of this one section of the Environmental Impact Statement with respect to the NEPA process as a

whole has been stressed repeatedly. Natural Resources Defense Council v. Calloway, 524 F.2d 79, 92 (2nd Cir. 1975); Chelsea Neighborhood Association v. U.S. Postal Service, 516 F.2d 378, 386-88 (2nd Cir. 1975); Monroe County Conservation Society v. Volpe, 472 F.2d 693, 697-98 (2nd Cir. 1972); Natural Resources Defense Council v. Morton, 388 V.Supp. 829, 834 (D.D.C. 1974), aff'd, 527 F.2d 1386 (D.C.Cir. 1976); Calvert Cliffs' Coordinating Committee v. A.E.C., 449 F.2d 1109, 1114 (D.C.Cir. 1971). See also, Council on Environmental Quality Guidelines, 40 C.F.R. §1500.8(a)(4). As stated by the Court of Appeals for the Second Circuit in Natural Resources Defense Council v. Calloway, 524 F.2d 79, 92-93 (2nd Cir. 1975):

'It is absolutely essential to the NEPA process that the decisionsmaker be provided with a detailed and careful analysis of the relative environmental merits and demerits of the proposed action and possible alternatives, a requirement that we have characterized as the 'linchpin of the entire impact statement.' Monroe County Conservation Society v. Volpe, 472 F.2d at 697-98. Indeed the development and discussion of a wide range of alternatives to any proposed federal action is so important that it is mandated by NEPA when any proposal 'involves unresolved conflicts concerning alternative uses of available resources,' 42 U.S.C. §4332(2)(D).'

The Federal Appellants attempt to respond on this point by arguing that the District Court "completely misconstrues" the testimony of Ms. Gresham (Fed. App't. Brf. p. 39), saying that her testimony "dealt exclusively with the tract selection process for Sale 40". (Fed. App't. Brf. p. 40). But Sale 40 is what we are talking about - what more probative source of evidence could there be than from a person directly involved in that tract selection process.

Federal Appellants also argue that the District Court,

"apparently failed to understand . . . that the selection process is merely the creation of the proposal for action which is then the subject of environmental study under NEPA." (Fed. App't. Brf., p. 40)

It is not clear what is meant here, but if it is intended to mean that tract selection is somehow insulated from NEPA review, this would be directly contra the decisions cited on the previous page requiring full considerations of alternatives. It is clear beyond question that tract selection, and the exploration and exploitation of the tracts selected, are fundamental to the NEPA evaluation. They were inadequately considered here,* as found by the District Court.

II. THE DISTRICT COURT PROPERLY APPLIED THE
"RULE OF REASON" IN CONCLUDING THAT THE
SECRETARY HAD VIOLATED NEPA.

This Court in Monroe County Conservation Council, Inc. v. Volpe, 472 F2d 693, 697 (2d Cir 1972) held that NEPA compel(s) federal agencies to give serious weight to environmental factors in making discretionary choices "and that it is at the very least an environmental full disclosure law". In NRDC v. Callaway, 524 F2d 79, 88 (2d Cir.1975) this Court held:

* The District Court quoted the total treatment of the exploration/exploitation separation alternative at pp. 61-62 of the Decision.

"It is absolutely essential to the NEPA process that the decisionmaker be provided with a detailed and careful analysis of the relative environmental merits and demerits of the proposed action and possible alternatives, a requirement that we have characterized as 'the linchpin of the entire impact statement', . . . In addition, the discussion of alternatives should be presented in a straightforward, compact and comprehensive manner 'capable of being understood by the reader without the need for undue cross reference.' CEQ Guidelines, 40 C.F.R. §1500.9(b)." (524 F2d 92, 93)

Measured against these standards, it is clear that the District Court properly concluded that the Secretary had violated NEPA on Sale 40.

It is also clear that the "rule of reason" does not lead to an opposite result. In Callaway, supra, the Navy argued that other dumping projects were "tentative and speculative" and that therefore the subject New London project "may be considered in isolation" (524 F.2d, at 87). This Court agreed with the Navy that NEPA does not require a "crystal ball" inquiry, but nevertheless held,

"The fact that another proposal has not yet been finally approved, adopted or funded does not foreclose it from consideration, since experience may demonstrate that its adoption and implementation is extremely likely." (524 F2d at 88)

This Court rejected the "rule of reason" as a justification for the district court decision (524 F2d at p.92) cautioning against too lenient an application of the rule as follows:

"Otherwise application of a 'rule of reason' would convert an EIS into a mere rubber stamp for post hoc rationalization of decisions already made." (524 F2d at p.95)

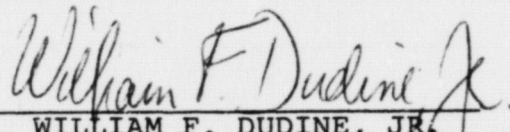
And with regard to any suggestion by the Federal Appellants that the program be permitted to go forward pending further environmental evaluation and safeguards, the following holding of this Court in Callaway, supra, applies fully:

"The trouble with this suggestion is that it offers 'too little and too late' to enable the EIS to be of any effective use." (524 F2d at 90)

CONCLUSION

Accordingly, Plaintiff-Appellee Concerned Citizens of Montauk, Inc. urges that the decision of the District Court be affirmed, and that the OCS #40 Sale be rescinded.

Respectfully submitted,


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UNITED STATES COURT OF APPEALS
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-----X

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AFFIDAVIT OF SERVICE

COUNTY OF SUFFOLK, ET AL., :

Appellees. :

-----X

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) ss.:
COUNTY OF NEW YORK)

Edward Manzo, being duly sworn, deposes and says:

1. I am an attorney admitted to practice in the courts of the State of New York and the United States District Court for the Southern District of New York.

2. On April 8, 1977 the parties of record in the referenced action were served by me with copies of the Brief for Appellee Concerned Citizens of Montauk, Inc. by deposit of postage prepaid first-class mail with the United States Post Office, addressed to the attorneys listed below.

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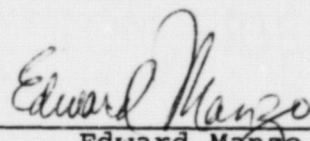
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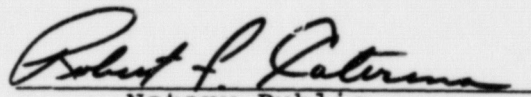
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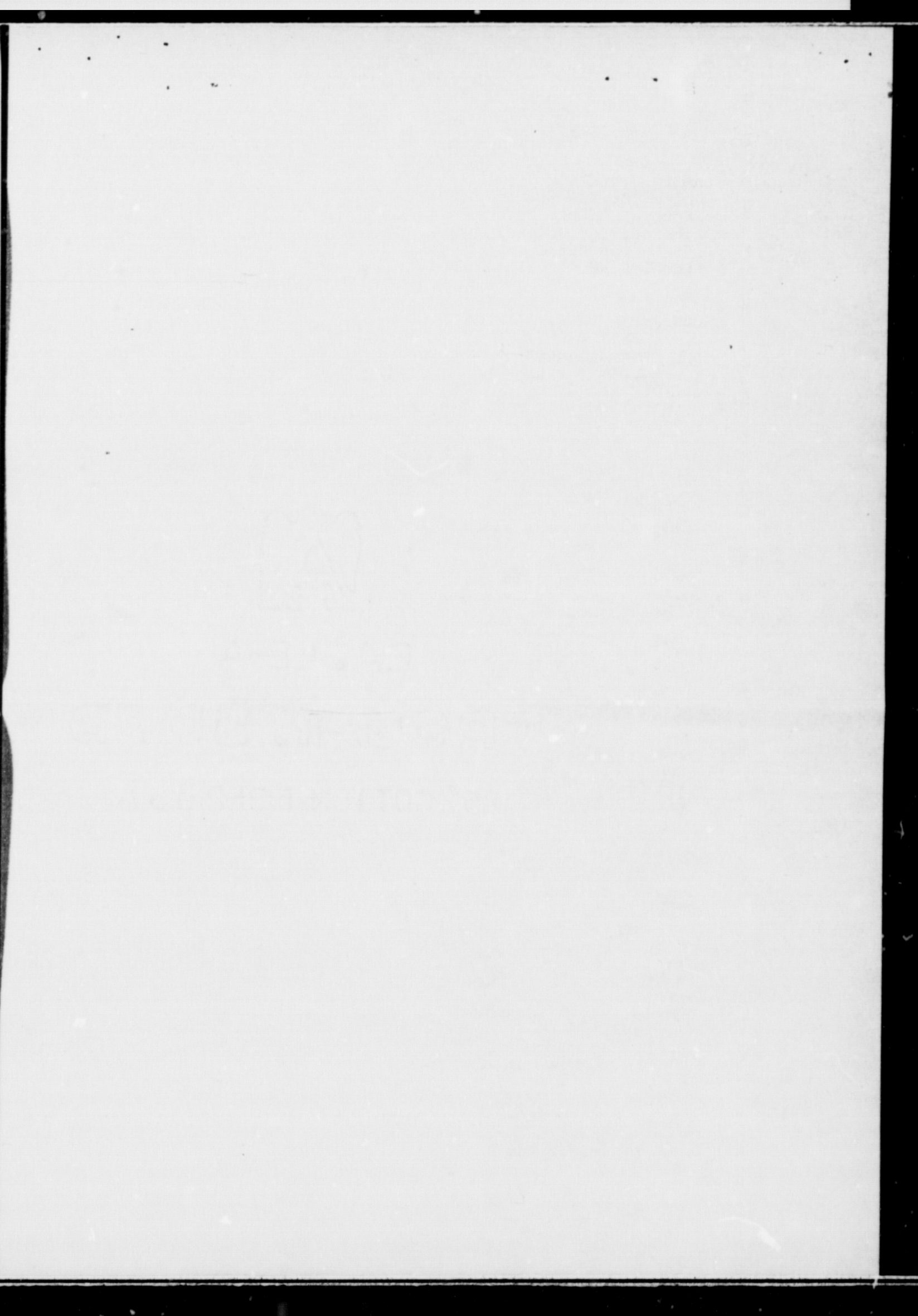
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Notary Public

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